against them on their own behalf was considered by the Magistrate. I see no reason to suppose that he overlooked any important item of evidence on either side. When, however, he came to formulate his final conclusions he made use of certain expressions of which, if I understand him correctly, I cannot approve, and what I have to consider is whether the sum total of what he said amounts to such a misdirection as to justify me in interfering.

Having dealt with the cases against and for the three respondents individually, he went on to refer to the invoice which had come from the alleged "guinea pig" firm in Singapore. He said that invoice had not been proved to be false and

> "I was satisfied that the cloth was purchased by third defendant at $1.85 per yard. In my opinion, when a person is charged for being knowingly concerned in a fraudulent attempt at evasion of customs import duty under section 114(i)(h) and if an invoice was produced by the person at time of applying to import, the prosecution must show that either the invoice is false by discovery and production of another invoice or that the seller is called to say that he sold at a different price and was asked by defendant to put up an invoice stating a lower price."

To my mind, these observations represent an unduly narrow view of the issues that were involved in the case. Clearly, if an invoice was produced by the importer and if there was nothing to show that that invoice was false or fraudulent to the knowledge of the importer then it would go far to demolish any question of fraudulent evasion of customs duty even although the value showed was very different from the value which has to be taken for assessment of customs duty by reason of the provisions of the Enactment. There are, however, many ways in which the effect of such an invoice can be shaken, or indeed destroyed, and it seems to me that in mentioning two of these ways only, that is, production of another invoice or direct evidence of an attempt to procure the execution of a false invoice the Magistrate took an unduly narrow view.

The proper view is that the onus of proof lay all along upon the prosecution. There was never and could never be at any time any question of a technical shifting of the onus of proof and the evidential value to be attached to any invoice or any other piece of evidence was entirely a matter for the consideration of the court of trial in the light of the circumstances of the individual case as a whole.

Had the matter rested there I should have been compelled as against the second and third respondents to allow the appeal and to order a re-trial. It did not, however, end there for the Magistrate went on to say, and this was his concluding observation :—

> "The stories given by the defendants were, I considered, consistent with innocence and might reasonably be true."

If the Magistrate came to that conclusion, it seems to me that although he had to some extent misdirected himself in fact as regards the strength of the prosecution case, he was bound to give the defendants the benefit of that conclusion. For my own part, I am not prepared on the printed evidence alone to say that I am justified in dissenting from that conclusion.

The appeal will therefore be dismissed as against the second and third respondents as well as against the first respondent.

There is one further point, however, which affects the first respondent. The Magistrate has failed to observe that it was open to him while acquitting the first defendant of the offence with which he stood charged under section 114 of the Customs Enactment to convict him of the offence of signing a false declaration in contravention of section 113(i)(a). On the evidence the first respondent was clearly guilty of such an offence and I have no hesitation in doing what the Magistrate should have done and that is convicting him of it. I impose a sentence of one month rigorous imprisonment and a fine of $500/- or another month in lieu of payment.

As to the question of forfeiture I make no order.

Appeal dismissed but first respondent convicted under section 113(i)(a).

SHANTI RUPCHAND BINWANI *alias* SHANTI
v.
UDHARAM DAYARAM BINWANI.

[Orig. Civ. Juris. (Jobling, J.) September 22, 1950]

[Penang — Civil Suit No. 250 of 1949]

Will — Bequest — Vested or contingent — Payment of legacy conditional upon marriage — Whether legatee entitled to payment on becoming sui juris — Assets of the estate in danger — Whether administration order should be made.

The defendant in this suit is executor and trustee of the will of N. G. Binwani deceased and the plaintiff, who is a legatee under the will, claims in the alternative for payment to her of $15,000 and interest under the will or an order for the administration of the estate.

By his will the deceased directed his executor to set aside the sum of $15,000 out of his one-third share in the business of D. R. Binwani & Co. which had branches at Penang, Singapore and Rhio and to invest the amount until the marriage of the plaintiff when it was to be used for her dowry and marriage expenses.

Counsel for the plaintiff contended that the legacy has vested in the plaintiff as it has been separated from the rest of the estate and there is no gift over in the event of failure to realise the condition. He further

contended on the authority of **In re Couturier, Couturier** v. **Shea** (2) that the amount of the legacy was payable now as the condition as to the marriage of the plaintiff could be disregarded.

Held, (1) that the legacy has vested in the plaintiff as it has been separated from the rest of the estate and that there is no gift over in the event of failure to realise the condition; (2) that in the case of a vested interest where the condition to be fulfilled is the attaining of an age greater than twenty-one the condition may be disregarded and the legacy paid over as soon as the legatee become **sui juris,** but a legatee is not entitled to payment upon becoming **sui juris** where some other condition upon which the payment is conditional has not been fulfilled, as in this case the marriage which has not taken place; and (3) that where the estate assets are in danger a legatee can obtain an order for the administration of the estate.

Cases referred to :—

(1) *In re Wrey, Stuart v. Wrey* (1885), 30 Ch. D. 507.

(2) *In re Couturier, Couturier v. Shea* (1907) 1 Ch. 470.

CIVIL SUIT.

Khoo Eng Cheang for the plaintiff.

R. D. Hume for the defendant.

Cur. Adv. Vult.

Jobling, J. : —The defendant in this Suit is executor and trustee of the will of R. G. Binwani deceased and the plaintiff, who is a legatee under the will, claims in the alternative for payment to her of $15,000/- and interest under the will or an order for the administration of the estate.

By his will the deceased directed his executor to set aside the sum of $15,000/- out of his one-third share in the business of D. R. Binwani & Co. which had branches at Penang, Singapore and Rhio and to invest the amount until the marriage of the plaintiff when it was to be used for her dowry and marriage expenses.

Mr. Khoo Eng Cheang has contended on the authority of the decision *In re Wrey, Stuart v. Wrey*(1) that the legacy has vested in the plaintiff as it has been separated from the rest of the estate and there is no gift over in the event of failure to realise the condition.

I think this is clearly so and find that the legacy is vested in plaintiff.

Mr. Khoo Eng Cheang further contended that the amount of the legacy was payable now as the condition as to the marriage of the plaintiff could be disregarded. He referred to the judgment *In re Couturier, Couturier v. Shea*(2) as authority for this. In that case payment of the legacy was, under the will, to be postponed until the legatee was twenty-five years of age and the Court held that as the legatee had reached the age of twenty-one the condition could in the circumstances be disregarded and the amount paid over to him.

In my view this case is only authority for holding that in the case of a vested interest where the condition to be fulfilled is the attaining of an age greater than twenty-one the condition may be disregarded and the legacy paid over as soon as the legatee becomes *sui juris*. It is no authority for disregarding any other condition.

The plaintiff has not yet married and there was no evidence produced to show that there was any immediate prospect of her marriage. Therefore although vested the legacy is not yet payable under the terms of the will and the claim to payment fails.

As to the claim to an administration order the plaintiff has a vested interest and is entitled to an order if she can show that the assets are in danger. She has produced an agreement entered into between the defendant on the one part and all the beneficiaries including the plaintiff on the other part by which the beneficiaries agreed to take over the Penang branch of the business of D. R. Binwani & Co. in satisfaction of deceased's interest in the partnership. The defendant also covenanted in this agreement to invest the sum of $15,000/- to be used for plaintiff's marriage and the agreement states that at the time of executing it the defendant had that sum in his hands. The agreement also states the capital and profits due to the deceased from the partnership business at the date of his death were represented by the sum of $52,694.54 exclusive of the sum of $15,000/-, which was to be invested by the trustee in the terms of the will. It is agreed by the plaintiff that this is a mistake and that the $52,694.54 includes the sum of $15,000/-.

The reference to the sum of $15,000/- being "now in the hands of the trustee" seems to follow from that the sum is excluded from the total share in the business and if that is incorrect then the probabilities are that the sum of $15,000/- was not in the defendant's hands at the time of executing the agreement. The defendant says it was not and on the evidence I think the alleged admission in the agreement that it was, can be disregarded.

The amount of deceased's share in the partnership was assessed by one Tek Chand, who prepared a balance sheet giving a slightly different figure, namely $52,805.05. The balance sheet is not admitted by defendant who had a statement of his own prepared and produced an audited account showing deceased's

share to be $52,851.08. This in turn is not admitted by the plaintiff.

In view of the fact that the sums stated in the agreement and in the two accounts are approximately the same I accept as a fact that the deceased's total share in the partnership was $52,851.08, the sum admitted by the defendant and the highest of the three amounts mentioned.

That being so are these assets in danger?

The defendant admits that he has not invested the $15,000/- as agreed but stated he had handed over all the assets of the Penang branch of the business to the value of $52,851.08 to the beneficiaries including the plaintiff in satisfaction of their claims. He says he expected to receive back $15,000/- from the beneficiaries to invest against plaintiff's marriage but that they have refused to comply with his demands for this sum.

The position is therefore that the defendant admits that he has contrary to his duty as executor and trustee parted with all the assets from which plaintiff's legacy was to be derived and the persons to whom he alleges he handed these assets deny that they have received more than their shares in the estate excluding the plaintiff's legacy. The defendant is therefore unable to account satisfactorily for the whereabouts of the plaintiff's legacy and he is apparently taking no action to obtain a refund of the amount of the legacy and invest it as directed.

In the circumstances I think plaintiff is entitled to ascertain whether her legacy is in defendant's possession or not and the first step towards this must be the taking of an account.

If it is shown that the defendant has handed over all the assets of the Penang branch of the business to the value of $52,851.08 he will be in a position to claim a refund of $15,000 from the beneficiaries and invest it according to the terms of the will.

I am most reluctant to order the administration of the estate in what is a purely family dispute but no other course seems open and I make the order accordingly. Costs reserved.

Order accordingly.

SINGAPORE REPORTS.

HONG CHEOK LAM
v.
ONG SING MAI AND 4 OTHERS.

[App. Civ. Juris. (Murray-Aynsley, C.J.)
February 1, 1951]

[Singapore — District Court Appeal No. 4 of 1951]

Landlord and tenant — Breach of terms of tenancy against sub-letting — Notice to Quit complied with by principal tenant but not by sub-tenants — Whether acceptance of rent after knowledge of the breach amounts to waiver of right of re-entry — Control of Rent Ordinance, 1947.

The plaintiff/respondent let the premises known as No. 31 Desker Road, Singapore, on a month to month tenancy to one Lim Chiang Chew who in breach of the terms of tenancy against sub-letting, sub-let parts of the said premises separately to the first, second, third and fourth defendants/appellants.

On the 7th November, 1949, the respondent's solicitors wrote to the principal tenant complaining against the prohibited sub-letting.

On the 2nd December, 1949, a Notice to Quit was served on the principal tenant. Before the expiration of the said Notice to Quit the respondent accepted rents which had accrued due after the 7th November, 1949 (the date of complaint of the breach).

The principal tenant complied with the Notice to Quit but the appellants refused to quit. The respondent thereupon commenced proceedings against them for the recovery of possession on the ground, **inter alia**, that the sub-tenancy was prohibited by the terms of the tenancy.

The appellants contended that even if the terms of the tenancy prohibited sub-letting there was a waiver of the breach by the respondent's acceptance of rent from the principal tenant during the continuance of the contractual tenancy after knowledge of the breach.

The learned District Judge held that sub-letting was prohibited and that the acceptance of rent in the circumstances stated above did not amount to a waiver.

Held, on appeal, that the acceptance of rent after knowledge of the breach amounted to a waiver of the right of re-entry.

Norman v. Simpson[1] followed.

Case referred to:—

(1) *Norman v. Simpson* (1946) K.B. 158.

APPEAL from Civil District Court.

K. K. Bezboruah for the appellants/defendants.

N. N. Leicester for the respondent/plaintiff.

Cur. Adv. Vult.

Murray-Aynsley, C.J. : — This appeal raises a point under the Control of Rent Ordinance of 1947. The facts are simple. The premises were let to one Lim Siang Chew. The learned District Judge has found as a fact that the terms of the letting forbade sub-letting. I am not prepared to disturb this finding. Later the landlord discovered this sub-letting and thereupon gave notice to quit. Before the expiry of the notice and during the continuance of the contractual tenancy the landlord received rent. Now the law on this point is clear. The affirmation of the tenancy after knowledge takes away the right of re-entry. It has been further held in the English case of *Norman v. Simpson*[1] that this has the effect of making the original sub-letting lawful. This was a majority decision of the Court of Appeal. du Parcq, L.J. dissented and if I had not had the advantage of seeing the judgments of the Lords Justices I should have decided the case on the lines of his judgment. I still feel unconvinced. No doubt in ordinary cases if the landlord lost his right of re-entry he was left without a remedy. The right of re-entry is, however, quite another thing from a right of action for damages for breach of contract. And where the breach of a condition had a remedy in damages there is logically no reason why the right should be affected by the loss of the right of re-entry. Even where there is no remedy in damages it does not seem to follow that the affirmation of the tenancy has the effect of making the sub-letting lawful. However, I must bow to superior authority and it is desirable, where possible, for the Courts of this Colony to follow the decisions of the Court of Appeal in England.

The next question is whether the difference in the wording of our local ordinance affects the meaning. In our Ordinance the words are "where the tenant was not prohibited from sub-letting by the terms of his tenancy." In England the words are "any sub-tenant to whom the premises . . . . have been lawfully sub-let". Now in ordinary cases lawful or unlawful depends entirely on the terms of the contract. If it is lawful to sub-let it is so because sub-letting is not prohibited by the contract between landlord and tenant.

If therefore acceptance of rent renders the sub-letting lawful it is because the law treats the acceptance of rent as impliedly altering the terms of the contract to this extent. I think, therefore, that for the present purpose the effect of the different words in the two enactments is the same.

The appeal must be allowed with costs.

Appeal allowed.

REX v. KOH HAI SUI.

[Orig. Crim. Juris. (Evans, J.) December 8, 1950]

[Singapore — Assize Case No. 56 of 1950]

Singapore Essential Regulations Proclamation, Regulations 34 and 81 — Prohibition of Imports Order,